



April 30, 2014

Via electronic mail

U.S. Fish and Wildlife Service
9014 E. 21st St.
Tulsa, OK 74129
ABB_ICP@fws.gov

Re: Draft Environmental Assessment and Draft Oil and Gas Industry Conservation Plan for the American Burying Beetle in Oklahoma

Dear Sir or Madam:

Devon Energy Production Company, L.P. ("Devon") hereby submits the following comments in response to the Fish and Wildlife Service's ("FWS" or "Service") Notice of Availability of the Draft Environmental Assessment ("EA") and Draft Oil and Gas Industry Conservation Plan ("ICP") for the American burying beetle ("ABB") in Oklahoma, 79 Fed. Reg. 21,480 (April 16, 2014). Devon submits these comments to the FWS because approval of the ICP and associated incidental take permits may allow Devon to obtain authorization for its oil and gas activities in occupied ABB habitat.

Devon's production is concentrated in North America. Devon produces over 2.5 billion cubic feet of natural gas each day, about three percent of all the gas consumed in North America. Devon has significant oil and gas leasehold interests, including fee, state, federal/Indian oil and gas leases and mineral interests, and operates approximately 527 wells in the range of the ABB. Additionally, Devon has numerous employees and contractors in the range of the ABB, and has a substantial number of additional employees supporting these assets based out of Devon's corporate headquarters in Oklahoma City, Oklahoma.

Summary of Comments

- The ICP should provide additional options for mitigating impacts to the ABB.
- Temporary impacts should not require permanent mitigation.
- The Permit may not regulate oil and gas activities occurring entirely outside of ABB habitat.
- The Service should clarify the upstream production activities covered by the Permit and ICP.
- The Service must resolve inconsistencies between the ICP, EA, and supporting documents.

- The Service must clarify how reference documents integrate with the ICP.
- The ICP requires unnecessary and duplicative funding assurances from permittees.
- The Service should reevaluate the photography specifications required for Individual Project Proposals (“IPPs”) and annual reports to make them less burdensome.
- The Service should revise its definition of ABB range.
- The Service should consider permitting activities that are partly contained within the ICP planning area.
- Practical challenges of authorizing incidental take in accordance with the ICP requires the Service to depart from conventional methods of authorizing incidental take.
- The Service should revise the ICP so that it correctly recites the No Surprises assurances provided by regulation.
- The Service should identify a timeline for its approval of IPPs.
- The Service should clarify the use of IPPs for operation and maintenance activities.
- The Service appropriately prepared an EA and may reach a finding of no significant impact.
- The EA must be revised to reflect that the ICP does not apply to oil and gas activities in unsuitable or unoccupied ABB Habitat.
- The EA must be revised to reflect that the ICP Does not apply to oil and gas activities with a federal nexus.
- The EA must clarify that the ESA does not prohibit take of candidate species and species proposed for listing.
- The EA must reflect that the ICP does not impose avoidance measures.
- Devon requests that the Service consider its discreet and detailed comments on the ICP, EA, and supporting documents.

I. SUBSTANTIVE COMMENTS AFFECTING ALL DOCUMENTS

Devon requests that the Service revise the ICP, Permit, and supporting documents to address the substantive issues outlined below.

A. The ICP Should Provide Additional Options for Mitigating Impacts to the ABB.

The ICP’s requirement that permittees mitigate all impacts to the ABB in perpetuity, and the few mitigation options that meet this requirement, do not provide permittees with sufficient flexibility to mitigate impacts. As a practical matter, of the three mitigation options identified in the ICP, the acquisition of conservation banking credits is the only

feasible mitigation option for an oil and gas operator. Indeed, in the ICP, the Service recognizes that third-party mitigation lands “are usually established for a single project rather than multiple projects,” such as the multiple oil and gas wells an operator may drill. See ICP, pg. 46; ABB Conservation Strategy for the Establishment, Management, and Operations of Mitigation Lands, pg. 6. Similarly, the transaction costs of permittee-established mitigation likely will prevent permittees from acquiring and managing their own mitigation lands. The Service should identify additional mitigation options to ensure adequate mitigation and allow operators greater flexibility to mitigate impacts. For example, operators should be able to mitigate impacts by remediating and/or restoring existing roads and well pads that are no longer in operation.

B. Temporary Impacts Should Not Require Permanent Mitigation.

The fact that “temporary impacts” may affect the ABB for a period longer than five years does not necessarily mean that impacts to the ABB are permanent. The FWS should authorize mitigation in place for a term longer than five years (but not permanent) to offset temporary impacts. Moreover, a possibility exists that there will not be enough permanent mitigation available to offset impacts. Allowing permittees to establish mitigation that lasts for a term but is not permanent may provide permittees with additional mitigation options other than those identified in the ICP.

C. The Permit May Not Regulate Activities Occurring Entirely Outside of ABB Habitat.

Using ABB habitat as a proxy for measuring incidental take, the draft Permit states that impacts to and loss of ABB habitat may not exceed a cumulative total of 32,234 acres from all permits issued under the ICP. Permit, pg. 2. In addition to this limitation on impacts to ABB habitat, however, Section I, Covered Area (Plan Area), of the Permit also constrains the amount of development that may occur in the 35,000-square mile planning area (“Planning Area”) for the ICP:

No more than 37,569 acres (15,204 hectares) of the Planning Area will be directly impacted by covered activities: including up to 2,030 miles (3,267 kilometers) of pipeline, 193 miles (311 kilometers) of roads (158 miles (254 kilometers) of permanent roads associated with wells, 30 miles (48 kilometers) of temporary roads associated with wells, and 5 miles (8 kilometers) associated with pipelines) and 3,319 well pads (approximately 4 acres (1.6 hectares) each), and 230 miles (370 kilometers) of electric distribution lines.

Permit, pg. 3. The EA contains similar statements. See EA, pgs. 4-1, 4-4, 4-12, 4-20, 4-31, 5-6. Although the ICP anticipates that 37,579 acres will be impacted by oil and gas activities in the Planning Area, the ICP does not limit impacts to this amount. See ICP, pg. 38.

The Service may not limit oil and gas activities occurring in the Planning Area but entirely outside of occupied ABB habitat. The ICP assumes that only 85.8 percent of the Planning Area may be habitat for the ABB. ICP pg. 34. The Service has recognized that activities in areas that are not favorable for use by ABB do not result in take of the ABB. Activities may proceed within the Planning Area in areas that are not favorable for use by ABB (as well as in unoccupied ABB habitat) without any need for incidental take coverage.

See ABB Impact Assessment for Project Review, pg. 10. Accordingly, the Service has no reason or authority to regulate activities occurring entirely outside of occupied ABB habitat. Devon requests that the Service revise the Permit to remove the limitation on impacts in the Planning Area set forth in Section I, Covered Area (Plan Area), of the Permit and remove similar references from the EA.

D. The Service Should Clarify the Upstream Production Activities Covered by the Permit and ICP.

The Service should clarify the upstream production activities covered by the Permit. First, the Permit and ICP should be revised to accurately list covered upstream production activities. The Permit and ICP list "drilling and hydraulic fracturing" as covered by the Permit. See Permit, pg. 3; ICP, pg. 10. However, this category is overly narrow because hydraulic fracturing is only one component of the well completion activities that occur after drilling concludes. Completion activities are identified elsewhere in the ICP as a covered activity. See ICP, pg. 13 ("All activities associated with drilling and well completion occurs on previously disturbed areas. . . . After drilling and completion, typically 35 percent of the well pad is re-vegetated."). The Service should revise the Permit and ICP to list "drilling and completion activities" as a covered upstream activity.

Furthermore, the discussion under the heading "Operation, Maintenance, and Decommissioning of Well Pads, Roads, and Electrical Distribution Lines" should be revised to reflect that wells, rather than "well pads," are operated, maintained, and decommissioned. "Wells" refer to oil and gas production infrastructure, which are located on well pads. "Well pads" are the cleared areas of land on which wells and associated infrastructure are located. "Well pads" are not decommissioned but are "reclaimed." The reclamation process includes restoration of the land form and vegetation. The ICP should be revised to reflect that "wells" are operated, maintained, and decommissioned and that the reclamation of well pads is also a covered activity under the Permit.

E. The Service Must Resolve Inconsistencies between the ICP, EA, and Supporting Documents.

The ICP, EA, and supporting documents contain inconsistencies with respect to minimization and mitigation measures, reporting requirements, the activities covered by the Permit, and changed circumstances. These inconsistencies must be resolved.

1. The ICP and Permit Must Consistently Describe Minimization and Mitigation Measures.

Several inconsistencies exist between the minimization and mitigation measures identified in the ICP and Permit. First, with respect to minimization measure No. 6 (Use of Artificial Lighting), the ICP states that "activities occurring during the ABB active season within occupied ABB habitat will be limited to daylight hours." ICP, pg. 42. The Permit, however, states that "construction activities" are subject to this limitation. Permit, pg. 5. The ICP and Permit must consistently identify which activities are restricted to daylight hours.

Second, with respect to mitigation measure No. 3 for post-construction restoration for temporary and permanent cover change impacts (Re-establishment of Vegetation), the ICP contains the following statement: "Preference should be given to the establishment of native vegetation if the landowner does not have specific requests and restoration of native vegetation is feasible." ICP, pg. 45. The Permit lacks this statement. See Permit, pg. 7. This statement should be added to the Permit.

Third, with respect to the offsite habitat mitigation options described in section 4.2.2.2 of the ICP, this discussion includes much more detail than the corresponding discussion in the Permit. *Compare* ICP, pgs. 45-47 *with* Permit, pg. 8. Conceivably, a permittee may look to the language of the Permit without realizing that additional requirements are contained in the ICP. Therefore, Devon requests that the Permit language mirror the ICP language, or simply incorporate the ICP language by reference, to avoid confusion or misunderstanding.

2. The ICP and Permit Must Consistently Describe Reporting Obligations.

The Service must review and revise the annual reporting requirements in the ICP and Permit to ensure consistency between the two documents. The ICP and Permit currently set forth different annual reporting requirements. *Compare* ICP, pg. 72 *with* Permit, pg. 10. For example, the ICP requires a map identifying the location of impacts but the Permit does not. *Id.* Similarly, the ICP requires "Permit number and IPP numbers" but the Permit does not. *Id.* Other inconsistencies exist as well. The Service must revise the reporting requirements in the ICP and Permit to ensure they are consistent.

3. Covered Upstream Activities Must be Consistently Described.

The Permit lists the construction of pipelines within a well pad area as an upstream activity covered by the Permits. See Permit, pg. 3. The ICP and EA, however, do not list the construction of pipelines within the well pad area as a covered upstream activity, *see* ICP, pg. 10; EA, pg. 2-2, although elsewhere these documents generally describe this activity as an upstream production activity. ICP, pg. 15; EA, pg. 2-2. The Service must revise the ICP, EA, and Permit to clearly identify whether the construction of pipelines within a well pad area is a covered upstream activity.

Additionally, the ICP identifies "drilling and production" activities as activities covered by the Permits ("Covered Activities"). See ICP, pg. 13. Elsewhere, however, the ICP only identifies "drilling and hydraulic fracturing" among the Covered Activities. See ICP, pg. 10. Similarly, the EA and Permit only identify drilling and hydraulic fracturing as Covered Activities. See EA, pg. 2-2; Permit, pg. 3. The Service must consistently describe production activities as those activities that are covered by the Permits.

4. Operation and Maintenance Activities Must be Consistently Described.

The ICP explains that operation and maintenance activities associated with midstream development include emergency (unplanned) repairs. See ICP, pg. 19. The EA, however, omits emergency or unplanned repairs from the list of activities associated with the operation and maintenance of midstream pipelines. See EA, pg. 2-7. The Service should

revise the list of operation and maintenance activities associated with midstream pipelines in the EA to include emergency repairs.

5. Changed Circumstances Must be Consistently Described.

One assumption outlined in the changed circumstances discussion in the ICP differs from the assumption stated in the Permit. The ICP assumes that “[a]reas with ‘temporary impacts’ or ‘permanent cover change impacts’ become suitable for ABB use within 5 years of disturbance.” ICP, pg. 53 (Assumption No. 3) (emphasis added). The Permit, however, only assumes that areas with temporary impacts become suitable for ABB use within 5 years of disturbance. Permit, pg. 11 (Assumption No. 3). The Permit language should be aligned with the ICP language.

6. The ICP and EA Should Consistently Describe the Size of the Planning Area.

The ICP and EA use slightly different acreage figures to describe the size of the Planning Area. The ICP states that the Planning Area is 22,858,163 acres while the EA states it is 22,858,240 acres. The two documents should use the same figure.

F. The Service Must Clarify How Reference Documents Integrate with the ICP.

The ICP identifies a series of “reference documents,” but the ICP is unclear whether permittees must comply with the reference documents as a condition of the Permit and ICP or whether the reference documents simply inform implementation of the ICP. *See* ICP, pg. iii. For example, the ICP states that No Surprises assurances only apply to permittees who are “in full compliance with the ICP, Permit, and other supporting documents.” ICP, pg. 52 (emphasis added). Similarly, the Permit identifies the following changed circumstance: “For all Covered Activities, the Permittee must use the most current reference documents found on the website at <http://www.fws.gov/southwest/es/oklahoma/ABBICP>.” Permit, pg. 15. Elsewhere, however, the ICP characterizes the Migratory Bird and Eagle Avoidance Measures and Species Take Avoidance Measures as “Service-recommended avoidance measures.” ICP, pg. 9 (emphasis added). The Service must clarify the relationship between the ICP and the associated reference documents by distinguishing the documents that provide permittees with background information, recommendations, or guidance; the documents that are forms that implement the ICP; and the documents that prescribe measures with which a Permittee is required to comply.

In doing so, Devon recommends that the Service classify the reference documents as containing recommendations or guidance rather than mandatory prescriptions. Given the numerous inconsistencies among the documents, the ICP, and Permit, permittees should not be bound to the terms of documents other than the ICP and Permit. Furthermore, some documents contain such general terms that the Service cannot require permittees to adhere to them. Specifically, the Migratory Bird and Eagle Avoidance Measures and Species Take Avoidance Measures for Non-Covered Species are far too generic for the Service to require strict compliance with their terms. For example, the Migratory Bird and Eagle Avoidance Measures state that “[r]ecommendations on avoidance practices, timing of surveys, and the suite of species potentially affected [by construction activities] may differ accordingly” but offer no recommendations on avoidance practices or timing of surveys and do not identify

any species that construction activities may affect. See Migratory Bird and Eagle Avoidance Measures, pg. 5. Similarly, the Take Avoidance Measures for Non-Covered Species direct that projects should be sited away from “high quality prairie habitat” for the rattlesnake-master borer moth but does not define “high quality prairie habitat.” Species Take Avoidance Measures for Non-Covered Species, pg. 59. Moreover, the Species Take Avoidance Measures for Non-Covered Species for harperella and winged mapleleaf state that pesticides should not be applied “within the riparian zone” but do not define “the riparian zone.” *Id.* at pgs. 17, 53. Without further guidance, Permittees cannot be expected to be bound to these vague prescriptions as terms of the Permit. Therefore, the Service must clarify that these documents provide guidance and recommendations to permittees but do not set forth mandatory prescriptions.¹

G. The ICP Requires Unnecessary and Duplicative Funding Assurances from Permittees.

Devon questions the need for the onerous financial assurances outlined in the ICP. Most permittees will commit funds for the principal cost of the ICP—mitigation—by purchasing conservation credits before conducting any activities that result in take of the ABB. See ICP, pg. 60. Because permittees will have secured mitigation prior to conducting activities that result in impacts to ABB habitat, only a few requirements of the ICP remain to be implemented, such as monitoring. These requirements are relatively inexpensive and do not necessitate the onerous funding assurances described in the ICP. Furthermore, the Service ignores that it possesses the authority to enforce the terms of the Permits and require completion of the remaining elements of the ICP. The permittee’s failure to adhere to the terms of the ICP and Permits can result in revocation of the Permits and, possibly civil and criminal penalties. See *Nat’l Wildlife Fed’n v. Norton*, 306 F. Supp.2d 920, 926-27 (E.D. Cal. 2004). The onerous funding assurances to ensure that the ICP is implemented after mitigation has been secured are unnecessary and should be revised.

Not only are the funding assurances unnecessary, the Service is requiring permittees to demonstrate financial assurances for significantly higher costs than the actual costs of fully implementing the ICP. The Estimate of American Burying Beetle Oil and Gas Industry Conservation Plan Implementation Costs (“Estimate of Implementation Costs”) suggests that permittees must demonstrate funding assurances to cover the following costs: 1) post-construction restoration; 2) mitigation for project impacts; 3) changed circumstances; and 4) other implementation costs.² Many of these costs are unnecessary and duplicative.

First, the requirement that permittees demonstrate financial assurances for mitigation for project impacts is unnecessary when the permittee utilizes mitigation credits

¹ Furthermore, the Service cannot require compliance with the Take Avoidance Measures for Non-Covered Species unless it removes the provisions related to candidate species and species proposed for listing or clarifies that these provisions are only mandatory if the species are listed in the future. Although Service guidance advises that it may be advantageous for permittees to include candidate species and species proposed for listing in an HCP, permit applicants are not required to do so. See FWS Habitat Conservation Planning Handbook, pg. 3-7.

² Notably, the Estimate of Implementation Costs does not explicitly state that the permittee must demonstrate funding for the sum of all of these costs. Conceivably, some of these funding assurances only apply if, for example, a permittee is responsible for its own mitigation lands and not if the permittee is acquiring mitigation credits from a conservation bank. The Service should revise the Estimate of Implementation Costs to more clearly identify the costs for which a permittee holder must demonstrate financial assurances.

to offset impacts. Because permittees must purchase mitigation credits prior to the Service's approval of IPPs, see ICP, pg. 60, a permittee will have fulfilled its mitigation obligation with no need to demonstrate any additional funding assurances. Therefore, the Service should revise the funding assurances required for the mitigation of project impacts (Item 2) to clarify that permittees who purchase mitigation credits prior to IPP approval need not demonstrate financial assurances for this element.

Second, the requirements that the permittees demonstrate funding assurances for post-construction restoration and changed circumstances are duplicative. To demonstrate funding assurances for changed circumstances, the Estimate of Implementation Costs requires permittees to demonstrate funding assurances to increase mitigation ratios for all impacts that would have been considered "temporary" or "permanent cover change" to permanent impacts; thus, permittees must demonstrate funding assurances for the difference between the cost of a temporary or permanent cover change impact and the cost of a permanent impact. See Estimate of Implementation Costs, pg. 2 (Item 3, subsections A and B). To demonstrate funding assurances for post-construction restoration, the Estimate of Implementation Costs requires permittees to calculate the cost of restoring temporary or permanent cover change impacts. *Id.* at pg. 1 (Item 1). The latter requirement ignores that if the permittee fails to restore temporary or permanent cover change impacts in accordance with the ICP, the impact is considered permanent and the permittee must provide additional mitigation. See ICP, pg. 48. This cost, however, is captured in the funding assurances for changed circumstances. There is no need for permittees to demonstrate financial assurance for providing permanent mitigation twice. Accordingly, the Service should revise post-construction restoration (Item 1) and changed circumstances (Item 3, subsections A and B) so that a permittee need only demonstrate once that it can provide funding assurances of the cost to increase mitigation from a temporary or permanent cover change impact to a permanent impact.

Finally, the Service must provide additional detail regarding how costs should be calculated for emergency repairs requiring habitat clearing (Item 3, subsection C) and other implementation costs (Item 4). With respect to the cost of emergency repairs, the Service requires permittees to estimate the "total acres of mitigation from new impact." Emergency operations, however, may not necessarily result in any impacts to ABB habitat. Furthermore, even if ABB was impacted by emergency operations, Permittees have no way of knowing at the time of IPP submittal how much habitat will be impacted. Similarly, permittees may have difficulty determining the "average annual cost of biological/effectiveness monitoring," the "average cost of compiling the annual report," and "other minimization measures"; moreover, these estimates may vary widely among permittees. As noted above, Devon questions the necessity of obtaining funding assurances for these costs; however, if the Service maintains that funding assurances are necessary for these costs, Devon suggests that the Service work with permittees to identify default values to streamline and standardize the required financial assurances.

H. The Service Should Reevaluate the Photography Specifications Required for IPPs and Annual Reports to Make Them Less Burdensome.

For IPPs that include temporary and/or permanent cover change impacts, the ICP requires that permittees submit photographs taken prior to impacts and with each annual report. EA, pgs. 67, 73. The photograph specifications are unnecessarily onerous.

Photographs must be in color. *Id.* The permittee must identify the date they were taken. *Id.* Permittees must also provide the latitude and longitude of each photograph point. *Id.* For non-linear projects, permittees must provide photographs of all four corners of the project site. *Id.* For linear projects, photographs must be provided every 0.25 miles along the project route. *Id.* Photographs must be taken in the four cardinal directions at each photograph point. *Id.* Thus, Permittees must submit 16 photographs for a single well pad, while Permittees must submit 160 photographs for a 10-mile pipeline—every year. For permittees with multiple projects, the photograph specifications quickly become extremely burdensome.

Devon requests that the Service consider alternative methods to obtaining photographic records that are less burdensome to permittees. For example, Devon questions whether the Service needs photographs both in the four cardinal directions at each photograph point and all four corners of the project site. It would seem that photographs only of the impacted area would suffice. Likewise, Devon questions whether the Service could obtain the information it needs through aerial imagery. Devon requests that the Service reevaluate the photography specifications in the ICP to make them less burdensome on permittees, and allow the permittee to have flexibility in providing adequate photographic documentation.

I. The Service Should Revise Its Definition of ABB Range.

The Service appears to rely on the Jurzenski dissertation to define ABB range. See ICP, pg. 22; ABB Impacts Assessment for Project Review, pg. 4. In defining ABB range, the Service cited the Jurzenski dissertation in support of its assumption that ABB can travel over 29 kilometers in a single night to find carrion. See *id.* The Jurzenski dissertation, however, implicitly recognized that the single ABB that traveled over 29 kilometers was an anomaly by excluding this information from the calculations. Specifically, the dissertation states:

In 2009, 1,097 (561, 529, and 7 undetermined) American burying beetles were captured in Brown, Holt, and Rock Counties, in which 59 recaptures traveled a mean distance of 0.41 (\pm 1.41 sd) km per night; however, 85% of the American burying beetles did not move to a different trap (distance equaled zero), and 90% [emphasis added] traveled 1.6 km or less. In June, one American burying beetle traveled 7.41 km in a single night and another was recaptured 29.19 km east-southeast from the original trap in which it was captured and marked the day before (this distance was excluded from average distance calculations) [emphasis added].”

It is unclear why the FWS considers the flight of a single ABB in one night of 29.19 km best available science warranting a map change when Jurzenski clearly excluded the information from her calculations. The FWS should clearly explain why the map is being changed.

Furthermore, the EA and ICP contain conflicting information regarding the distance the ABB will travel to find carrion. The EA states that ABB are capable of finding a carcass up to 18.6 miles (30 kilometers) away between one and 48 hours after the animal’s death. EA, pg. 3-17 (citing Jurzenski et al. 2011). The ICP, however, states that ABB can find a carcass up to 2 miles (3.22 km) away between one and 48 hours after the animal’s death. ICP, pg. 23

(citing Ratcliffe 1996). These two conclusions are inconsistent with each other and rely on different scientific studies. The Service must reconcile this issue in its final EA and ICP.

J. The Service Should Consider Permitting Activities that are Partly Contained within the ICP Planning Area.

The ICP and its supporting documents make clear that only activities that are fully contained within ICP Planning Area may be covered by the Permit. ICP, pg. 10; Eligibility Determination for the ABB ICP, pg. 2. The FWS should provide its rationale for this position, which is unclear and must be explained. If the FWS is attempting to narrow the scope of the impacts analyzed in the EA or its Section 7 consultation, limiting the authorization is not the way to do so. The FWS should explain that projects with termini outside of the Planning Area require case-by-case review by the FWS to determine whether the EA and Section 7 consultation associated with the ICP adequately analyzed the project's impacts; if the EA and Section 7 consultation did not consider impacts of specific projects with termini outside of the project area, additional National Environmental Policy Act ("NEPA") analysis and/or Section 7 consultation may be necessary. This approach provides FWS with the flexibility to consider projects with termini outside of the Planning Area while still limiting the scope of the EA and Section 7 consultation to a manageable amount.

K. Practical Challenges of Authorizing Incidental Take in Accordance with the ICP Requires the Service to Depart from Conventional Methods of Authorizing Incidental Take.

Devon recognizes the practical difficulties of managing incidental take authorizations for a general conservation plan ("GCP") such as the ICP. Nevertheless, Devon observes that the ICP's method for authorizing take may not align with the protections the ESA affords permittees. The ICP authorizes impacts to 32,234 acres of occupied ABB habitat. ICP, pg. 65. Each Permit issued under the ICP may authorize impacts to a specific number of acres of habitat or simply state that take under that particular Permit is subject to the ICP's general 32,234-acre take authorization for all Permits issued under the ICP. Under this approach, the take authorization under one permit may be prematurely proscribed by the activities of other operators under separate permits. If, for example, Devon receives a permit authorizing 5,000 acres of take, and Devon has only developed 2,500 acres when Devon's activities and the activities of other operators collectively result in impacts to 32,234 acres of ABB habitat, the take allowed under Devon's permit would be effectively limited to half its stated amount due to actions taken by other permittees.

Under the ESA, take authorizations attached to permits must reflect the take actually authorized under the permit, not take caused by other projects or actions. 16 U.S.C. § 1536(b)(4)(C)(i) (requiring incidental take statements to specify "the impact of such incidental taking"); see *Wyoming Outdoor Council v. Bosworth*, 284 F. Supp. 2d 81, 84 (D.D.C. 2003) ("If the FWS finds no jeopardy, it nonetheless must provide the agency with a statement indicated any incidental take of the species *resulting from the proposed action*" (emphasis added)). Similarly, the Service must ensure that any measures proposed for authorizing take—such as acreage disturbance limitations—are "correlated with take caused by the project" and "reflect the take actually caused by the project." *South Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 723 F. Supp. 2d 1247, 1280 (E.D. Cal. 2010). This process requires establishing a "causal link" between the take authorization

in a permit and the actual take that occurs as a result of the permitted activity. *Ariz. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1250 (9th Cir. 2001) (disapproving of a take authorization measure based on general "ecological conditions" in the project area, which the court held were factors outside of applicant's control).

With respect to the ICP, there exists a very real possibility that the activities of other operators could prevent Devon from reaching the maximum amount of take authorized by its permit. Take caused by the activities of other operators is not authorized under Devon's permit and thus is not "correlated with take caused by [Devon's] project," and does not "reflect the take actually caused by [Devon's] project." *South Yuba River Citizens League*, 723 F. Supp. 2d at 1280. Rather, the actions of other operators are totally outside of Devon's control. The Service also cannot establish a "causal link" between the take caused by other operators and the take authorized under Devon's specific permit. *Ariz. Cattle Growers*, 273 F.3d at 1250. Although Devon understands the practical difficulties of managing a workable take authorization for a GCP such as the ICP, Devon notes the potential inconsistencies between this take authorization and established case law under the ESA that protects permittees.

II. DETAILED COMMENTS ON THE ICP

The Service should revise the ICP so that it correctly recites the No Surprises Assurances provided by regulation. Additionally, the Service should identify a timeline for its approval of IPPs. Finally, Devon requests that the Service consider its comments on discrete provisions of the ICP.

A. The ICP Should Correctly Recite No Surprises Assurances.

The ICP should correctly recite regulatory language related to the No Surprises assurances rather than paraphrasing the rule. As drafted, the ICP misstates the assurances provided with an incidental take permit, changed circumstances procedures, and procedures for unforeseen circumstances. The Service should review and ensure that the ICP correctly reflects the regulatory language at 50 C.F.R. § 17.22(b)(5).

First, the ICP states: "[N]o Surprises assurances do not apply when a continuing activity is likely to jeopardize the continued existing and recovery of an endangered or threatened species or result in the destruction or adverse modification of designated critical habitat." ICP, pg. 52. This statement imprecisely characterizes 50 C.F.R. § 17.22(b)(8). This rule states that the Service cannot revoke a permit (not that "No Surprises assurances do not apply") unless continuation of the permitted activity (not "a continuing activity") will appreciably reduce the likelihood of the survival and recovery of the species in the wild. See *id.* (citing 16 U.S.C. § 1539(a)(2)(B)(iv)). Although the differences are slight, Devon requests that the Service adhere to the regulatory language.

Second, the description of changed circumstances erroneously characterizes the Service's obligations under the No Surprises rule. The ICP states:

If the Service determines that additional conservation measures not provided for in the agreement are necessary to respond to changed circumstances, the Service will not require any conservation measures in addition to those provided for in the

agreement without the consent of the Permittee, provided the agreement is being properly implemented.

ICP, pg. 58 (emphasis added). This discussion should also note that the Service will not require any "mitigation" measures not provided for in the agreement. See 50 C.F.R. § 17.22(b)(5)(ii).

Finally, the ICP misstates requirements in the event of unforeseen circumstances. The ICP states that the Service has the "responsibility" of demonstrating unforeseen circumstances exist. In fact, the regulation states that the Service has the "burden" of demonstrating unforeseen circumstances exist. See 50 C.F.R. § 17.22(b)(5)(iii)(C). The Service should revise the ICP to use the correct regulatory language. Additionally, although the ICP states that in the event of unforeseen circumstances, the Service will work with permittees to develop an appropriate response to new conditions, see ICP, pg. 59, the ICP entirely omits the constraints on the measures that the Service may require of permittees. The ICP must include the regulatory language addressing unforeseen circumstances in 50 C.F.R. § 17.22(b)(5)(iii)(B):

If additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, the [Service] may require additional measures of the permittee where the conservation plan is being properly implemented, but only if such measures are limited to modifications within conserved habitat areas, if any, or to the conservation plan's operating conservation program for the affected species, and maintain the original terms of the conservation plan to the maximum extent possible. Additional conservation and mitigation measures will not involve the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the conservation plan without the consent of the permittee.

The No Surprises assurances and the Service's limits to react to changed and unforeseen circumstances are material to the ICP and the Permit. The ICP must be revised to incorporate the correct regulatory language.

B. The Service Should Identify a Timeline for Its Evaluation of IPPs.

The ICP should include a timetable by which the Service commits to process IPPs. As drafted, the ICP provides permittees with no guidance about the length of time necessary for the Service to approve IPPs. This information would be useful so that permittees can plan accordingly and avoid unexpected delays to their operations.

C. The Service Should Clarify the Use of IPPs for Operation and Maintenance Activities.

The Service should clarify when IPPs are necessary for operation and maintenance activities. The ICP explains states that permittees may "lump" operation and maintenance activities for multiple projects into one IPP and that the IPP must include a general description of the types of activities, estimate the size and frequency of the activities, and typical impact of the activities. ICP, pg. 67. The ICP, however, does not specify when or

why a permittee would require an IPP solely from operation and maintenance activities. Operations and maintenance of upstream facilities include planned upgrades to existing equipment and unplanned repairs, but they “typically occur within the existing well pad.” See ICP, pg. 14. Therefore, operation and maintenance activities for upstream activities should not impact ABB habitat. Moreover, presumably operation and maintenance of new facilities will be covered by IPPs prepared for construction of these new facilities. The Service must clarify whether an IPP is necessary for operation and maintenance activities for upstream facilities and, if so, why an IPP is necessary. It may be useful for the Service to identify more specifically identify which operation and maintenance activities may require an IPP.

The ICP also states that take associated with operation and maintenance activities must be mitigated prior to impact: “Following operation and maintenance IPP approval, Permittees must ensure that take associated with these activities is appropriately mitigated prior to impacts.” ICP, pg. 67. This statement ignores that operations and maintenance of upstream facilities typically occur within the existing well pad, see ICP, pg. 14, and therefore will not impact ABB habitat. The Service must revise the ICP to explain when IPPs are necessary for operations and maintenance activities.

D. Discrete Comments on the ICP

Page 4 - The ICP states that applicants must agree to implement avoidance, minimization, and mitigation actions described in the ICP; however, the ICP does not identify avoidance measures. The reference to avoidance actions should be removed.

Pages 5-6 - The ICP states that projects are ineligible to participate in the ICP if they will result in take of “non-covered, federally-listed, regulated, and protected species.” The description “non-covered, federally-listed, regulated, and protected” is confusing. Take of certain species with status under the ESA, such as candidate species and species proposed for listing, is not prohibited. Although the Service has recognized there are “advantages” to including unlisted species in a habitat conservation plan, it is not required to do so. See Habitat Conservation Planning Handbook, pg. 3-7. The ICP should use more specific language such as: “species listed as threatened or endangered under the ESA or species protected by the Bald and Golden Eagle Protection Act or Migratory Bird Treaty Act.”

Page 8 - The ICP states: “Permittees under this ICP will work with the State Historic Preservation Office and Tribal Historic Preservation Offices to overcome any impacts to historical and cultural resources.” This statement inaccurately summarizes obligations under the National Historic Preservation Act (“NHPA”). The ICP should be revised to state: “Permittees under this ICP will work with the Service, State Historic Preservation Offices, and Tribal Historic Preservation Officers to assist the Service in fulfilling the requirements of Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, and its implementing regulations at 36 C.F.R. part 800.”

Page 8 - The ICP states: “Activities permitted through this ICP will avoid impacts to Indian sacred sites and not limit access to Indian sacred sites on Federal lands.” This language appears to misstate the requirements of Executive Order No. 13007, 61 Fed. Reg. 26,771 (May 29, 1996), which imposes obligations on federal agencies when managing federal lands. Section 1(a) of the Executive Order states: “In managing Federal lands, each

executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites." The Service should align the language of the ICP with the responsibilities imposed on the Service by the Executive Order and any other applicable Executive Orders (such as Executive Order No. 3206 (June 5, 1997)).

Page 9 (Section 1.7) - Section 10(a)(2)(A)(iii) of the ESA requires applicants to describe "what alternative actions to the taking the applicant considered, and the reasons why such alternatives are not being utilized." The ICP states that an alternative to the proposed incidental taking is for project proponents to avoid actions that could result in take of ABB. The ICP, however, should also note that an alternative to the taking proposed under the ICP is the Service's consideration of incidental take on a case-by-case basis. This alternative would likely result in piecemeal permitting and inconsistent conservation measures; consequently, it would not yield the comprehensive and coordinated conservation of the ABB as provided by the ICP.

Page 45 - The following sentence should be clarified by adding the bolded text to make clear that monitoring for invasive species is only required for temporary or permanent cover change impacts and is required during the five-year period during which restoration must occur:

Because vegetation composition may change the carrion base (small mammal and bird composition) of an area, Permittees will monitor project sites **with temporary or permanent cover change impacts** following post-construction restoration and document any invasive species . . . in their annual reports during the **five-year** restoration period.

Pages 46-47 - With respect to third-party mitigation lands, the ICP states: "The mitigation land sponsor (landowner or easement holder) is responsible for ensuring the success of and managing the approved mitigation land in perpetuity." Devon suggests that the Service replace this language with clearer language found in the ABB Conservation Strategy for the Establishment, Management, and Operations of Mitigation Lands: "The mitigation land sponsor (landowner or easement holder) assumes liability for the success of the mitigation land with the approval of the Service." ABB Conservation Strategy for the Establishment, Management, and Operations of Mitigation Lands, pg. 6 (emphasis added).

Page 53 - The ICP explains that Conservation Priority Area boundaries will be re-evaluated every three years and may be adjusted. If CPA boundaries are adjusted, "Permittees will mitigate appropriately for new impacts based on the location of project impacts, according to the latest CPA delineation method" (emphasis added). The ICP should further clarify that if impacts have occurred but restoration of temporary or permanent cover change impacts is not complete, the new CPA boundaries will not apply and additional mitigation credits will not be required.

Page 56 - Section 5.1.6 explains that if invasive species are adversely affecting the ABB to a degree not contemplated in the ICP in areas that have been restored, Permittees will work to develop an invasive species control plan. The ICP should limit the timeframe

after restoration is complete when Permittees will be required to develop an invasive species control plan. It would be unreasonable to require Permittees to develop an invasive species control plan a decade after restoration is complete.

Page 67 - The IPP Checklist states that IPPs must contain a “[m]ap and description of the area of Permit coverage (location of impacts), including photographs.” Devon asks that the Service confirm that it intends to require permittees to submit maps with the area of Permit coverage rather than maps of an individual project area.

III. DETAILED COMMENTS ON THE EA

The Service appropriately prepared an EA and reached a finding of no significant impact. The EA, however, must be revised to reflect that the ICP does not apply to oil and gas activities in unsuitable or unoccupied ABB habitat. Additionally, the EA must be revised to reflect that the ICP does not apply to oil and gas activities that have a federal nexus. Furthermore, the EA must clarify that the ESA does not prohibit take of candidate species and species proposed for listing. Moreover, the EA must reflect that the ICP does not require avoidance measures. Finally, Devon requests that the Service consider its discrete comments on the EA.

A. The Service Appropriately Prepared an EA and May Reach a Finding of No Significant Impact.

The Service may conclude that approval of the ICP and issuance of Permits will not significantly impact the human environment. In the draft EA, the Service assessed the impacts of approving the ICP and issuing permits on a variety of resources, including geology, soils, water resources, water quality, air quality, vegetation, wetlands, wildlife, threatened and endangered species, land use, aesthetics, noise, socioeconomics, environmental justice, tribal resources, and cultural resources. See EA, chs. 3, 4. It compared these impacts to the impacts of the no-action alternative, which would result from operators either avoiding take of the ABB or developing Habitat Conservation Plans (“HCPs”) on a case-by-case basis. See *id.*; EA, pg. 2-1; Forty Most Asked Questions Concerning CEQ’s NEPA Regulations, 46 Fed. Reg. 18,026, 18,027 (March 23, 1981) (directing inclusion of “predictable actions by others” in the no-action alternative); see also *Young v. Gen. Serv. Admin.*, 99 F. Supp.2d 59, 74 (D. D.C. 2000). Based on this analysis, the Service appropriately concluded that impacts from approval of the ICP and issuance of Permits will not be significant. EA, pgs. 4-4, 4-6, 4-8, 4-9, 4-12, 4-14 - 4-15, 4-19, 4-22 - 4-23, 4-27 - 4-28, 4-31, 4-32 - 4-33, 4-34, 4-35, 4-35 - 4-36, 4-37, 4-38. This finding is consistent with the Service’s guidance. “Normally, the Service believes that analysis at the level of an EA will be sufficient for HCPs.” Habitat Conservation Planning Handbook, pg. 5-3. Accordingly, the Service appropriately concluded that approval of the ICP and issuance of the Permit will not significantly impact the human environment.

B. The EA Must be Revised to Reflect that the ICP Does Not Apply to Oil and Gas Activities in Unsuitable or Unoccupied ABB Habitat.

The EA repeatedly suggests that approval of the ICP and issuance of Permits will result in oil and gas activities in unsuitable or unoccupied ABB habitat. For example, the EA states: “No more than a cumulative 37,569 acres (15,204 hectares) of the 35,716-square mile Planning Area . . . would be directly impacted by covered activities.” EA, pg. 4-1. This

statement is incorrect. Oil and gas activities are anticipated to impact 37,769 acres throughout the Planning Area; however, not all of the Planning Area is ABB habitat. *See* ICP, pg. 39. Instead, oil and gas activities are expected to impact 32,234 acres of ABB habitat. *See id.* These references must be removed from the EA because oil and gas activities may proceed in unsuitable or unoccupied ABB habitat regardless of whether the Service authorizes incidental take of ABB.

Similarly, the EA repeatedly asserts that approval of the ICP will impact areas with land cover that is unsuitable ABB habitat. For example, the EA repeatedly suggests that approval of the ICP will impact cropland. EA, pg. 4-10 ("impacts to land for cultivated crops should be short term"), 4-29 ("impacts on crops would also be minor as new pipelines would be buried underground, allowing for crops to be planted and harvested following installation of the new pipeline"). Likewise, the EA suggests that approval of the ICP will impact urban areas. *See* EA, pg. 4-11 ("New pipelines, well pads, and associated facilities in . . . urban areas would have much less potential impact than new projects crossing or within forested areas."). The EA also concludes that approval of the ICP will directly impact wetlands within the Planning Area. *See* EA, pg. 4-13 ("Direct impacts to wetlands resulting from oil and gas activities would be associated with geophysical exploration, construction of new facilities, and maintenance of existing facilities."). The ICP, however, clearly explains that cultivated crops, urban areas, and wetlands do not provide suitable habitat for the ABB. ICP, pgs. 34-36; *see also* ABB Oklahoma Presence/Absence Live-trapping Survey Guidance, pgs. 1-2; ABB Impacts Assessment for Project Review, pg. 5. Operators need not obtain authorization to incidentally take ABB before proceeding with activities in these areas.³ *See* ABB Impacts Assessment for Project Review, pg. 10. Accordingly, approval of the ICP, or approval of any other authorization to take ABB, will not affect whether oil and gas activities proceed in these areas. The EA should be revised to make clear that no impacts to these areas will result from approval of the ICP.

C. The EA Must be Revised to Reflect that the ICP Does Not Apply to Oil and Gas Activities with a Federal Nexus.

The EA erroneously suggests that approval of the ICP would cause oil and gas activities with a federal nexus to proceed. For example, the EA states that approval of the ICP would directly impact wetlands. *See* EA, pgs. 4-13 - 4-14. Similarly, the EA indicates that oil and gas activities would occur in areas of tribal jurisdiction, which may include Indian lands. *See id.* at pgs. 4-36-4-37. Moreover, the EA suggests that oil and gas activities could occur on lands managed by the National Park Service and the U.S. Forest Service. *See id.* at pgs. 4-30 ("applicants would coordinate with the appropriate government agencies to avoid or minimize conflicts with existing or planned parks and/or recreational areas that are located within their individual incidental take permit areas").

The EA overlooks that these activities likely have a federal nexus and thus may be subject to section 7 of the ESA. Oil and gas activities that impact wetlands may require a permit under section 404 of the Clean Water Act. *See* 33 U.S.C. § 1344. Oil and gas activities on Indian lands may require approval of an application for a permit to drill from the Bureau of Land Management. *See* 43 C.F.R. pt. 3160; Onshore Oil & Gas Order No. 1, 72 Fed. Reg. 10,328 (May 7, 2007). Likewise, oil and gas activities on lands managed by the National

³ Other authorizations may be required that are not provided by the ICP, as noted below in subsection C.

Park Service or Forest Service may require authorizations from these agencies. These federal approvals are subject to the obligations in section 7 of the ESA. See 16 U.S.C. § 1536(a); ABB Impacts Assessment for Project Review, pg. 8-9. Therefore, these activities with a federal nexus are outside of the scope of the ICP. See ICP, pg. 5 ("Projects that have a Federal nexus, including those authorized, funded, or carried out by a Federal agency, should address their incidental take of listed species through consultation with the Service under Section 7 of the ESA, and are therefore not addressed here."). Accordingly, approval of the ICP will have no bearing on whether these oil and gas activities proceed. The EA must be revised to reflect that approval of the ICP will not necessarily cause oil and gas activities to proceed in wetlands, on Indian lands, or on lands managed by the National Park Service or Forest Service.⁴

D. The EA Must Clarify that the ESA Does Not Prohibit Take of Candidate Species and Species Proposed for Listing.

Section 4.9.2 of the EA addresses "noncovered, protected species" and includes candidate species and species proposed for listing under the ESA among these "protected" species. See EA, pg. 4-23. The characterization of candidate species and species proposed for listing as "protected" species suggests that the ESA prohibits take of these species. The EA should clarify that take of these species is not prohibited.

E. The EA Must Reflect that the ICP Does Not Impose Avoidance Measures.

The ICP requires participants to implement minimization and mitigation measures to reduce the impacts of unavoidable take of the ABB. The ICP does not impose avoidance measures. Accordingly, references to avoidance measures that appear throughout the EA should be removed. See EA, pgs. 4-12, 4-19, 4-23, 4-28, 4-31, 4-37, 5-7.

F. Discrete Comments on the EA

Page 1-3 (Section 1.1.2) - The need for the proposed action observes: "Implementing the ICP would eliminate need for processing multiple, individual Habitat Conservation Plans (HCPs) and reduce workload associated with processing incidental take permit requests from the oil and gas industry." This discussion should also note two additional and related needs for the proposed action. First, the proposed action is needed to coordinate authorizations of incidental take of the ABB and avoid piecemeal take authorizations. Second, the proposed action is needed to ensure that consistent mitigation and minimization measures are implemented to yield the greatest conservation benefit for the ABB.

Page 3-24 (Section 3.10.1) - The EA states: "[T]he planning regions of the Planning Area on average consist of approximately 15 percent cropland, 20 percent forest cover, and 26 percent pastureland (Figure 3-2)." The Service should compare these figures with the land uses described in Table 1 of the ICP and ensure the figures are consistent. See ICP, pgs. 34-36. There appears to be some conflict between the land uses described in the EA and ICP. For example, the EA states that 15 percent of planning regions of the Planning Area consist of cropland, but Table 1 of the EA states that 1.1 million acres, or six percent, of the

⁴ However, the EA should analyze whether indirect impacts to wetlands and tribal lands will occur as the result of approval of the ICP.

Planning Area are cultivated crops. *Compare* EA, pg. 3-24 *with* ICP, pg. 36. The Service should reconcile these figures or explain how they are consistent.

Page 4-2 - The EA suggests that hydraulic fracturing and/or underground injection of wastewater may result in increased seismic activity. The EA, however, cites no empirical evidence sufficient to support a conclusion that hydraulic fracturing or underground wastewater injection induces seismic activity.

Page 4-5 - The EA states: "During pipeline construction, water may be withdrawn for hydrostatic testing, hydraulic fracturing, horizontal drilling operations (to prepare drilling mud, and dust control along the construction rights-of-way." Hydraulic fracturing and horizontal drilling operations are activities associated with drilling and completing oil and gas wells, not pipeline construction. The EA should be revised to correctly associate these activities with the drilling and completion of oil and gas wells.

Page 4-7 - The EA asserts that hydraulic fracturing "may cause" impacts to groundwater. The EA does not cite, and Devon is not aware of, any empirical evidence sufficient to support a conclusion that hydraulic fracturing impacts groundwater.

Page 4-11 - The EA asserts that waste gas from oil and gas production may be flared and converted to sulfur dioxide and nitrogen oxides, which "may dissolve in moisture in the atmosphere forming acidic droplets that may contribute to the formation of acid rain." Devon is not aware that these effects of flaring have been observed and believes these statements may be speculative.

Page 4-12 (Section 4.6.2) - When assessing impacts of the ICP on vegetation, the EA correctly notes that vegetation types within ABB habitat would be preserved as the result of the ICP. The EA should also note that where temporary and permanent cover change impacts occur to vegetation in ABB habitat, the ICP requires that vegetation be restored within five years of the impact.

Pages 4-14 - 4-15 (Section 4.7.2) - The EA incorrectly suggests that approval of the ICP may lead to the spread of invasive weeds, stating: "Spread of invasive nonnative species could also result from vegetation clearing." When temporary or permanent cover change impacts will occur, however, the ICP requires permittees to restore vegetation and, in doing so, avoid invasive species. ICP, pg. 45. Furthermore, the ICP includes response actions that will be implemented if invasive species adversely affect ABB habitat on lands with restored vegetation. See ICP, pg. 56. Accordingly, the ICP minimizes the potential for invasive species to impact areas where vegetation was cleared. The EA should be revised to reflect the ICP's measures to minimize the potential for invasive species.

Page 4-18 (Section 4.8.1) - The EA erroneously states that, under the no-action alternative, operators would implement measures required by the ICP in the event of changed circumstances. Specifically, the EA states: "any potential increase in fire ant populations would be minimized by the avoidance, minimization, and conservation measures described in Section 5.1.6 of the ICP (emphasis added)." This reference appears to be a typographical error. Section 5.1.6 of the ICP outlines responses to a changed circumstance (the Service determines that invasive species are adversely affecting the ABB) that may be implemented under the ICP. Presumably, however, oil and gas operators would not

implement the ICP and a response to changed circumstances under the no-action alternative. The EA should be revised to remove this statement from the discussion of the no-action alternative or, if the FWS retains this statement, clarify the intent of this statement.

Pages 4-20 - 4-23 (Section 4.9.1) - The Service should review the discussion of impacts from oil and gas activities on the ABB that are outlined in the EA and compare it to the discussion of anticipated effects of the ICP on the ABB outlined in Section 3.2 of the ICP. The Service should ensure that anticipated effects that are outlined in the ICP are also incorporated in the EA.

Page 4-27 - The EA incorrectly states that "any impacts to habitat of noncovered, protected species that are federally listed as threatened or endangered would require authorization with the Service . . ." (emphasis added). Not all impacts to habitat constitute take; take results from "significant habitat modification or degradation that significantly impairs essential behavioral patterns of fish or wildlife." 50 C.F.R. § 17.3. The statement in the EA should be revised to state that "impacts to habitat of noncovered, protected species that rise to the level of take. . . ."

Page 4-28 - The EA states that "where covered activities could directly impact federally listed species not covered under the ICP, the applicants would coordinate with the Service to determine how to gain authorization for potential take of these species" (emphasis added). This statement should be revised in two ways. First, the phrase "directly impact" should be replaced with the word "take." Not all impacts to listed species rise to the level of "take." Second, the phrase "potential take" should be replaced with the word "take."

Page 4-37 (Section 4.15.1) - The EA should explain the basis for its conclusion that, under the no-action alternative, some projects would significantly impact cultural resources. Under the no-action alternative, oil and gas operators would either avoid impacts that result in take of the ABB or would receive authorization for incidental take from the Service after developing an HCP. If operators avoid impacts to the ABB by foregoing planned development, presumably cultural resources would not be impacted. If operators developed HCPs and received incidental take authorization from the Service, Section 106 of the NHPA would apply and require the Service to identify historic properties and avoid, minimize, and mitigate adverse effects to them. *See generally* 36 C.F.R. part 800. Therefore, it would seem that adverse effects to cultural resources likely would not occur under the no-action alternative. The Service should explain its basis for concluding otherwise or revise the EA accordingly.

Page 4-37 - The EA should be revised to correctly describe the requirements of the NHPA. First, the following statement is imprecise: "Federal regulations established under Section 106 of the National Historic Preservation Act of 1966, as amended, provide standards for considering the severity of possible direct and indirect impacts." The Section 106 regulations do not provide standards for evaluate effects to historic properties. A more accurate characterization of the Section 106 regulations would state: "Federal regulations at 36 C.F.R. part 800 set forth procedures that define how federal agencies meet their obligations under Section 106 of the National Historic Preservation Act to take into account the effects of their undertakings on historic properties and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on such undertakings."

Second, the following statement is also imprecise: "According to the Secretary of the Interior's regulations for protection of historical and archeological resources (36 CFR 800), adverse impacts may occur directly or indirectly when a project causes changes in archeological, architectural, or cultural qualities that contribute to a resource's historic or archeological significant." This definition of "adverse impacts" is not found in 36 C.F.R. part 800. Rather, the regulations provide that an "adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." 36 C.F.R. § 800.5(a)(1).

Page 4-38 -The EA states that, "to participate in the ICP, applicants must agree to conduct an historical/cultural review of their project site and work with State Historical Preservation Officer/Tribal Historical Preservation Officer to overcome any significant impacts; avoid any impacts to Indian sacred sites; and not limit access to Indian sacred sites on Federal lands." This language misstates the requirements of both the NHPA and Executive Order No. 13007, 61 Fed. Reg. 26,771 (May 29, 1996), and must be revised.

First, the statement that applicants "must agree to conduct an historical/cultural review of their project site and work with State Historical Preservation Officer/Tribal Historical Preservation Officer to overcome any significant impacts" appears to derive from the NHPA; however, this statement does not fully capture the NHPA's requirements. For example, the NHPA requires the identification of historic properties within the area that potentially may be affected by a project, not just the project site itself. See 36 C.F.R. §§ 800.4(a). Similarly, the NHPA requires avoidance, minimization, and mitigation of "adverse effects" to historic properties, not "significant impacts." 36 C.F.R. §§ 800.5, 800.6. Rather than attempting to restate the complex requirements of the NHPA, the EA should include a simple statement to the following effect: "to participate in the ICP, applicants must agree to work with the Service, State Historic Preservation Offices, and Tribal Historic Preservation Officers to assist the Service in fulfilling the requirements of Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, and its implementing regulations at 36 C.F.R. part 800. Compliance with Section 106 requires identification of historic properties in areas affected by the federal authorization and implementation of measures to avoid, minimize, and mitigate adverse impacts to historic properties."

Second, the EA's statement that applicants must "avoid any impacts to Indian sacred sites" and "not limit access to Indian sacred sites on Federal lands" appears to derive from Executive Order No. 13007, which imposes obligations on federal agencies when managing federal lands. Section 1(a) of the Executive Order states: "In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites." The language of the EA should be aligned with the responsibilities imposed on the Service by the Executive Order.

IV. DETAILED COMMENTS ON SUPPORTING DOCUMENTS

Devon requests that the Service revise the Eligibility Determination for the ABB ICP, the IPP Checklist, Species Assessment, ABB Conservation Strategy for the Establishment, Management, and Operations of Mitigation Lands, Migratory Bird and Eagle Impact Avoidance Measures for Actions Associated with Oil and Gas Projects, and Take Avoidance Measures for Non-Covered Species Related to Oil and Gas Projects within the ABB Range in Oklahoma in accordance with its comments outlined below.

A. Eligibility Determination for the ABB ICP

Page 3 (Question 7) - Question 7 misstates the requirements of both the NHPA and Executive Order No. 13007, 61 Fed. Reg. 26,771 (May 29, 1996), and must be revised. First, Question 7 asks applicants to “agree to conduct an historic/cultural review of your project site and work with the State Historic Preservation Office and Tribal Historic Preservation Officers to overcome any significant impacts.” This request appears to derive from the NHPA, but does not fully capture the NHPA’s requirements. For example, the NHPA requires avoidance, minimization, and mitigation of “adverse effects” to historic properties, not “significant impacts.” 36 C.F.R. §§ 800.5, 800.6. Rather than attempting to restate the complex requirements of the NHPA, Question 7 should include a simple statement to the following effect: “Do you agree to work with the Service, State Historic Preservation Offices, and Tribal Historic Preservation Officers to assist the Service in fulfilling the requirements of Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, and its implementing regulations at 36 C.F.R. part 800? Compliance with Section 106 may require cultural surveys of areas affected by your project and implementation of measures to avoid, minimize, and mitigate adverse impacts to historic properties.”

Second, Question 7 asks applicants to “avoid any impacts to Indian sacred sites” and “not limit access to Indian sacred sites on Federal lands.” These criteria appear to derive from Executive Order No. 13007, which imposes obligations on federal agencies when managing federal lands. Section 1(a) of the Executive Order states: “In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.” The language of Question 7 should be aligned with the responsibilities imposed on the Service by the Executive Order.

Page 3 (Question 8) - In the event the criteria listed in Question 8 are met and a federal authorization (other than the incidental take authorization) is necessary for the project to proceed, the project is ineligible for incidental take authorization through the ICP. Question 8 asks whether a project will be on ecologically significant or critical areas under federal ownership or jurisdiction, including parks, recreation areas, refuge lands, wilderness areas, wild or scenic rivers, national natural landmarks, aquifers, wetlands, national monuments, and other such areas. ABB ICP Eligibility Determination, pg. 3. If so, Question 8 asks the project proponent to “agree to work with managing entities and meet their requirements”; the ABB ICP Eligibility Determination then directs that if the proponent can agree to this term, the project may continue. *See id.* (“If yes, proceed to step 9.”). However, if a project will be on areas under federal ownership or jurisdiction and a federal

authorization (other than authorization of incidental take of ABB) is required for the project to proceed, the project is outside of the scope of the ICP. See ICP, pg. 5 ("Projects that have a Federal nexus, including those authorized, funded, or carried out by a Federal agency, should address their incidental take of listed species through consultation with the Service under Section 7 of the ESA, and are therefore not addressed here."). Question 8 should properly instruct project proponents that if development will be on one of the identified areas under federal ownership or jurisdiction and will require federal authorization to proceed, the project is ineligible for the ICP.

Notably, the Service's rationale for inquiring about the criteria listed in Question 8 is unclear. These criteria are the extraordinary circumstances that preclude the Department of the Interior's application of a categorical exclusion under NEPA. See 40 C.F.R. § 1508.4; 43 C.F.R. § 46.215. The Service, however, is not categorically excluding activities for which take is authorized by the Permit from NEPA analysis.⁵ Rather, the Service has elected to prepare an EA to analyze the potential impacts of approving the ICP. See Memorandum from H. Dale Hall, FWS Director to Asst. Reg'l Directors, Final General Conservation Plan Policy (Oct. 5, 2007) ("the Service will prepare . . . one NEPA decision document for all of the actions to be covered under the GCP"). Therefore, there is no reason to evaluate the applicability of extraordinary circumstances and this list should be deleted.

B. Individual Project Package Checklist

Page 3 - The heading "Maps and Description of Area of Permit Coverage" is inaccurate because the area to be described is the project area and not the area of permit coverage. The Service should revise this title to state: "Maps and Description of Area of IPP Approval."

Page 3 - Please see the comments regarding the "operations and maintenance" language on page 67 of the ICP and adjust the discussion on page 3 of the IPP Checklist accordingly.

C. Species Assessment

Page 2 - Question 3 states that a project will not result in take of ABB if the action area does not include "potentially suitable ABB habitat." The ABB Impact Assessment for Project Reviews uses different terminology to describe "potentially suitable habitat," referring instead to areas "favorable for use by ABB." ABB Impact Assessment for Project Reviews, pg. 8. Because the Species Assessment should use the same terminology as the ABB Impact Assessment for Project Reviews, the reference to "potentially suitable habitat" should be changed to "areas favorable for use by ABB."

D. ABB Conservation Strategy for the Establishment, Management, and Operations of Mitigation Lands

Page 14 - The Conservation Strategy for the Establishment, Management, and Operations of Mitigation Lands contains a statement regarding the location of mitigation

⁵ In fact, the Service may only categorically exclude activities that it or the Department has specifically identified in its guidance. See Dep't of the Interior Manual, pt. 516, ch. 8 § 8.5; 43 C.F.R. § 46.25. The Service has not suggested that IPPs or the activities covered by an IPP are among the activities that it may categorically exclude from NEPA analysis.

lands that appears to conflict with a requirement of the ICP. The Conservation Strategy for the Establishment, Management, and Operations of Mitigation Lands states: "Greater than or equal to 95% of the proposed mitigation land property must be comprised of ABB habitat and within ABB CPAs." The ICP, however, suggests that all mitigation lands must be within ABB CPAs: "All offsite mitigation provided for the ABB under this ICP must be within an ABB CPA." ICP, pg. 49. The Service must reconcile these requirements.

Page 18 - The document states: "The Service must approve all mitigation proposals prior to sale." This statement does not clearly explain whether the seller or purchaser of mitigation credits must obtain the approval of the sale of mitigation credits. Presumably, the Service does not intend to obligate purchasers with obtaining approval of mitigation credits because this requirement does not appear in the ICP and its reference documents. The Service must clarify that sellers rather than purchasers must obtain Service approval prior to sale; however, if the Service intends to require that purchasers obtain approval of mitigation proposals prior to sale, the Service must revise the ICP and the supporting documents to highlight this requirement for permittees.

E. Take Avoidance Measures for Non-Covered Species Related to Oil and Gas Projects within the ABB Range in Oklahoma

The Take Avoidance Measures for Non-Covered Species direct the preparation of spill prevention and response plans to avoid take of many species. For example, the avoidance measures for the harperella require "frequent inspection of ongoing operations and contingencies for rescue of harperella, as necessary, subject to approval of the Service." Take Avoidance Measures for Non-Covered Species, pg. 17; *see also id.* pgs. 26-27, 34. Similarly, another measure requires training "at least annually" for spill prevention and response teams. *Id.* pgs. 34, 45. However, U.S. Environmental Protection Agency ("EPA") regulations require the preparation of Spill Prevention, Control and Countermeasure Plans and Oil Spill Contingency Plans in certain circumstances and defined the contents of these plants. The Take Avoidance Measures may not alter these regulatory requirements.

Conclusion

Devon appreciates the opportunity to submit comments on the ICP, EA, and related materials. If you have any questions about these comments, please contact Angie Burckhalter at angie.burckhalter@dvn.com or (405) 552-8069.

Sincerely,



Darren Smith, Manager
Corporate EHS Policy